Nos. 85-1883, 85-1892, 85-1901, 85-1902 and 85-1949

# In the Supreme Court of the United States

OCTOBER TERM, 1986

Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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THOMAS E. MAROTTA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

DONALD J. PAONE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

SAMUEL RUSSOTTI, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

RENE PICCARRETO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

RICHARD J. MARINO and JOSEPH R. ROSSI,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the government is precluded under the Double Jeopardy Clause from including a predicate offense in a Racketeer Influenced and Corrupt Organizations Act (RICO) indictment where that offense purportedly could have been, but was not, included in a prior RICO indictment, charging a separate "pattern of racketeering," on which petitioners were acquitted.

2. Whether a New York rule requiring corroboration of accomplice testimony must be applied in a federal RICO prosecution.

3. Whether the admission of co-conspirator statements violated the Confrontation Clause on the ground that the court of appeals assertedly failed to require those statements to be independently analyzed for reliability.

4. Whether petitioner Marotta was denied his right to conflict-free counsel at trial because his attorney, some ten years earlier, had briefly represented a government witness on an unrelated matter, and whether the other petitioners were prejudiced by this purported conflict of interest.

5. Whether the district court properly refused to allow petitioner Marino to call Marotta's attorney as a witness during trial.

6. Whether the district court correctly refused to admit the prior testimony of two of the defendants where the federal government was not a party to, nor a participant in, the proceedings giving rise to the testimony.

7. Whether consecutive sentences may be imposed for conspiracy and substantive violations of the RICO statute.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 782 F.2d 386. The opinion of the court of appeals on a prior interlocutory appeal in the same case (85-1902 Pet. App. B1-B18) is reported at 717 F.2d 27.[1]

## JURISDICTION

The judgment of the court of appeals was entered on February 5, 1986. Petitions for rehearing were denied on March 19 and 24, 1986 (Pet. App. A20; 85-1892 Pet. App. A23-A24). The petition for a writ of certiorari in No. 85-1883 was filed on May 15, 1986; the petitions in Nos. 85-1892, 85-1901, and 85-1902 were filed on May 16, 1986; and the petition in No. 85-1949 was filed on May 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d). Each petitioner was sentenced to 20 years' imprisonment on each of the two counts. Petitioners Russotti, Piccarreto, Marino, and Rossi received consecutive sentences on the two counts, while petitioners

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-1883. "Tr." refers to the trial transcript.

Marotta and Paone received concurrent sentences.[2] The court of appeals affirmed (Pet. App. A1-A17).

The evidence at trial, which was presented over eight weeks and consumed more than 8,000 pages of transcript, established that between 1971 and 1982 petitioners belonged to an organized crime group in the Rochester, New York, area that engaged in the extortion of gambling clubs. To maintain control over the gambling clubs—and to discipline dissident members, combat rival groups, and avoid prosecution—the members of the group engaged in murder, attempted murder, arson, and obstruction of justice. In particular, the indictment charged petitioners with committing, as acts of racketeering, two murders, three attempted murders, two acts of extortion, an attempted arson, and three obstructions of justice.

The evidence showed that in February 1971, Angelo Monachino and Vincent Massaro were inducted into a criminal organization known as the "mafia" or "La Cosa Nostra" in a ceremony at the home of Frank Valenti, the boss of the organization (Tr. 898-904, 913-915, 920). Thereafter, in 1972, Valenti was deposed and petitioner Russotti became the boss (Tr. 927-930). At the same time, Sam Gingello became the underboss, petitioner Piccarreto became the counselor, and petitioners Marino and Marotta became captains (Tr. 927). Under Russotti's direction, Marino was assigned to supervise Monachino, Massaro, Spike Lanovara, and Eugene DiFrancesco (Tr. 932). During the years following Russotti's accession to leadership, new recruits were admitted

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[2] Three co-defendants, Joseph J. Trieste, Joseph L. LaDolce, and John M. Trivigno, were acquitted at trial. Co-defendant Anthony M. Colombo was convicted at trial, but he has not petitioned for certiorari.

into the organization, including John Fiorino, Thomas Didio, and petitioners Paone and Rossi (Tr. 934-937).

In November of 1973, Eugene DiFrancesco advised Monachino that Piccarreto had ordered him to "hit" Vincent Massaro. Massaro, DiFrancesco reported, had disobeyed the leadership and complained about not being paid (Tr. 938-940, 947). DiFrancesco asked Monachino to help him carry out the "hit" (Tr. 940). When Monachino and DiFrancesco failed to execute Massaro promptly, Piccarreto met with Russotti, Marino, Gingello, and Monachino, and directed Monachino to take charge of the project personally (Tr. 948-952). Marino suggested that the murder be committed at Monachino's place of business (Tr. 953).

Following orders, Monachino, DiFrancesco, and Lanovara lured Massaro to Monachino's office; there, DiFrancesco shot Massaro in the back of the head and killed him (Tr. 964-965, 967-968). Monachino, DiFrancesco, and Lanovara then put Massaro's body in the trunk of his car, where it was later discovered (Tr. 975). Monachino and DiFrancesco thereafter told Marino that the job was done. Marino congratulated them (Tr. 981-982).[3]

In 1973, Thomas Pelusio obtained permission from petitioner Marotta to open an illegal gambling club in Rochester (Tr. 4159-4160, 4165). Although Marotta provided no services to the club, Pelusio paid Marotta a weekly fee for permission to operate (Tr. 4163-4164). During the following years, Pelusio, again after obtaining permission from Marotta or another organization member, opened several other

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[3] The murder of Vincent Massaro formed the basis for the first racketeering act, charging solicitation and conspiracy to murder Massaro.

gambling clubs in Rochester. In each instance, he made regular payments to Marotta, Didio, or Paone (Tr. 4169-4186). Pelusio understood that if he did not make his weekly payments to the members of the organization, his clubs would not be allowed to operate (Tr. 4182).

In 1976 and 1977, Gingello and petitioners Russotti, Piccarreto, Marino, and Marotta were tried and convicted in state court for the murder of Vincent Massaro (Tr. 6535, 6782). They were imprisoned in early 1977 (Tr. 4190, 6782). Because of his incarceration, Gingello chose Didio to assume his position in the organization (Tr. 4185-4186). During this period of imprisonment, however, because of dissatisfaction with the performance of Didio and his associates, a rift developed within the organization (Tr. 4191). Eventually, a faction led by Didio was expelled from the organization, and two rival factions vied for control of the gambling clubs (Tr. 2731-2734, 2738-2739).

In the fall of 1977, the defendants in the Massaro murder case were released from prison because it was discovered that local law enforcement officers had testified falsely at their trial (Tr. 2723, 2738, 2743-2746, 6535). Gingello's release, and his resumption of a leadership role in the organization, precipitated further violence between the two competing factions. In April 1978, a car bomb killed Gingello (Tr. 1687, 2755). The remaining members of Gingello's faction, which included the six petitioners and their associates Anthony Oliveri and John Fiorino, made plans to pursue those they deemed responsible for Gingello's murder, including Didio, Dominic Celestino, and Rosario Chirico (Tr. 2756-2758, 2767-2769, 2770, 2823-2824, 3553-3556, 4209-4211, 5882).

During May 1978, in furtherance of this revenge scheme, Rossi told Oliveri to follow Chirico in order to determine if there was any way to "get at him" (Tr. 2779). Oliveri thereafter recruited co-defendant Anthony Colombo to shoot Chirico in a wooded area between Chirico's home and his place of business (Tr. 2787-2795). Rossi provided Oliveri with a rifle and a motorcycle driver to assist in his escape (Tr. 2796-2798). On May 25, 1978, Colombo shot at Chirico but only wounded him (Tr. 2806, 6548). When Rossi learned that Chirico had been hit, he commented that "at least we got that much done" (Tr. 2806).[4]

Rossi next directed Oliveri to kill Celestino (Tr. 2813-2814). On June 18, Colombo, Rossi, and Oliveri lay in wait near Celestino's home (Tr. 2815-2816). Their murder attempt failed, however, because Celestino had been arrested earlier that day (Tr. 2816-2818).[5]

Following the attempt to shoot Celestino, Rossi told Oliveri to try to kill Didio, the leader of the rival faction. Fiorino and Paone were also assigned to find Didio (Tr. 2830-2832, 2836-2837). On July 5, 1978, Rossi, Colombo, and Oliveri drove to a motel in the Rochester area where Didio's girlfriend had been seen (Tr. 2852-2853). After the girlfriend departed, Colombo fired a machine gun into the room she had left, killing Didio (Tr. 2857-2863, 6429-6430).

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[4] The attempted murder of Rosario Chirico formed the basis for the second racketeering act, charging solicitation, conspiracy, and attempt to murder Chirico.

[5] The attempted murder of Dominic Celestino formed the basis for the third racketeering act, charging solicitation, conspiracy, and attempt to murder Celestino.

Oliveri, Colombo, and Rossi then sped from the scene. After the men abandoned their weapons and car, Marotta picked them up. Rossi reported, "I think we got him," and Marotta responded, "good" (Tr. 2864-2867).[6]

Following the murder of Didio, Rossi directed Oliveri to burn down the automotive body shop owned by Chirico in order to force him to leave town (Tr. 2883).[7] Oliveri and an associate unsuccessfully attempted to carry out this order, using gasoline and an incendiary device known as a "molotov cocktail" (Tr. 2884, 5598-5607, 5645).

At the same time that the revenge plots were being executed, Rossi and Oliveri assumed responsibility for collecting the ongoing payments from the gambling clubs (Tr. 2739, 2771-2776, 4200). Rossi would take the money to Russotti, Oliveri and Paone (Tr. 2776-2778). After Thomas Torpey, who owned one of the clubs, stopped making his weekly payments, he was visited by members of the organization, first by Piccarreto and Marino, and later by Russotti and Piccarretto. Russotti told Torpey, "You've got something going on in this town. I want a piece of it" (Tr. 4955). Finally, John Fiorino threatened to close the club because Torpey was not paying (Tr. 4976-4978). Fiorino threatened Torpey, "You know, you're no su-

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[6] On a later occasion, Paone said he was surprised that it only took one bullet to kill Didio. He added that he was also surprised that with all the bullets that were fired, only one had hit Didio (Tr. 4215). The murder of Thomas Didio formed the basis for the fourth racketeering act, charging solicitation, conspiracy, and the murder of Didio.

[7] Russotti had earlier tried to obtain some dynamite for the same purpose (Tr. 5884-5890).

perman. You can bleed and die like anybody else" (*ibid.*).[8]

In January 1979, Angelo DiMarco, an owner of one of the clubs making payments to Rossi, was subpoenaed to appear before a federal grand jury (Tr. 1688-1697, 1691-1693, 1726, 2775-2776). When he appeared, DiMarco described to the grand jury how he had given envelopes of cash to an employee every week for delivery to Rossi (Tr. 1728). Shortly thereafter, Rossi directed Anthony Oliveri to kill DiMarco, and he provided the weapons and a car for the murder (Tr. 2900, 2904, 2907). As Oliveri and Colombo waited near DiMarco's house, armed with a shotgun and pistol, a police car approached them and the two men were arrested (Tr. 2909, 2916).[9]

Vincent Rallo, an insurance broker, had arranged on Marino's behalf to register and insure in the names of fictitious persons the cars that were used in the murder of Thomas Didio and the attempted murder of Angelo DiMarco (Tr. 5892-5907, 5921-5934). After Oliveri and Colombo were arrested in one of those cars, Rallo told Marino that he was afraid the car would be traced to him (Tr. 5934). When Rallo was subsequently subpoenaed to appear before a federal grand jury, Marino told him to testify falsely by inventing descriptions of the fictitious persons in whose names the cars had been registered (Tr. 5936).

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[8] Extortions from two of the clubs formed the basis of the eighth and ninth racketeering acts, each charging the conspiracy, attempt, and actual commission of a federal extortion offense.

[9] The attempted murder of DiMarco and the related obstruction of justice formed the basis for the fifth and sixth racketeering acts, charging the state offenses of solicitation, conspiracy, and attempted murder of DiMarco, and the federal offense of obstruction of justice.

Early in 1981, Rallo decided to cooperate with the government. In that capacity, he tape-recorded three discussions he had with Marino regarding the progress of the government's investigation. In the course of those discussions, Marino gave Rallo instructions about how to testify before the grand jury (Tr. 5938). The recordings of those discussions were played for the jury at trial (Tr. 5955, 5974, 5977).[10]

## ARGUMENT

1. Petitioners Piccarreto and Marino renew their contention (85-1902 Pet. 6-13; 85-1949 Pet. 18-25)—previously raised and rejected by the court of appeals in an interlocutory appeal (85-1902 Pet. App. B1-B18)—that the Double Jeopardy Clause precluded the government from including the 1973 Massaro homicide as a racketeering predicate in this indictment. The Massaro homicide should not have been included, they argue, because that crime could have been charged as a predicate act in a 1976 racketeering indictment on which petitioners were acquitted. In rejecting this argument once before, the court of appeals held that the two indictments charged two distinct patterns of racketeering: the earlier indictment had charged an arson-for-insurance scheme, while the present one charged a pattern of extortion. 85-1902 Pet. App. B10-B16. The Massaro murder, the court of appeals noted, was charged "as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme*—a scheme which had no relationship to the 1976 arson-for-hire activity" (85-1902 Pet. App. B15-B16 (emphasis in original)). Be-

[10] The obstruction of justice with regard to Vincent Rallo formed the basis for the seventh racketeering act, charging the federal offense of obstruction of justice.

cause the two indictments could be separately prosecuted without offending the Double Jeopardy Clause, and because the Massaro murder was properly charged as part of the pattern of racketeering activity alleged in the second indictment, the government was not barred from including that offense as a predicate act in this case.

Following the court of appeals' earlier rejection of their double jeopardy claim, petitioners sought certiorari and made the same arguments they are making now. We argued in our brief in opposition to certiorari (Nos. 83-696 and 83-713) that the decision of the court of appeals was correct, and this Court denied review. In the present case, the court of appeals once again rejected petitioners' arguments (Pet. App. A16). Nothing has changed that would warrant further review of this issue at this time. We therefore rely on our previous submission in opposing this claim.[11]

2. Petitioners Marino and Rossi assert (85-1949 Pet. 3-8) that the definitional section of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961(1), incorporates state procedural provisions—in this case, the New York rule requiring that the testimony of accomplice witnesses be corroborated. Because the district court purportedly failed to require corroboration in this case, petitioners contend that the six predicate acts involving murder or attempted murder did not qualify as acts of "racketeering activity" within the meaning of Section 1961(1).[12] The court of appeals rejected that argu-

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[11] We are providing petitioners with copies of our brief in opposition in Nos. 83-696 and 83-713.

[12] It is well established that under federal law a conviction can properly rest on the uncorroborated testimony of an accomplice. See *Caminetti* v. *United States*, 242 U.S. 470, 495

ment, as has every other circuit that has considered it.

The courts of appeals have uniformly held that the reference in Section 1961(1) to crimes "chargeable under State law" is intended "simply to define the wrongful conduct, and not to incorporate state procedural law." *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). The courts have consistently refused to incorporate state procedural rules such as the requirement that accomplice testimony be corroborated, see *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); the law of merger, see *United States* v. *Licavoli*, 725 F.2d at 1046-1047; state speedy trial rules, see *United States* v. *Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979); and state statutes of limitations, see *United States* v. *Brown*, 555 F.2d at 418 n.22.[13] See generally *United States* v. *Nardello*, 393 U.S. 286 (1969) (reference in Travel Act to state "extortion" statutes encompasses any conduct that would generally be classified as ex-

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(1917); *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

[13] The same principle applies to other federal statutes that incorporate state criminal charges for definitional purposes. See *United States* v. *Steele*, 685 F.2d 793, 807 (3d Cir.), cert. denied, 459 U.S. 908 (1982) (18 U.S.C. 1952); *United States* v. *Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982) (18 U.S.C. 1952); *United States* v. *Cerone*, 452 F.2d 274, 286-287 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972) (18 U.S.C. 1952); *United States* v. *Corallo*, 413 F.2d 1306, 1322-1323 (2d Cir.), cert. denied, 396 U.S. 958 (1969) (18 U.S.C. 1952); *United States* v. *Revel*, 493 F.2d 1, 2-3 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (18 U.S.C. 1955).

tortionate, regardless of the label given to the conduct by state law).[14]

3. Petitioners Paone, Marino, and Rossi challenge (85-1892 Pet. 9-18; 85-1949 Pet. 15-18) the admission of certain co-conspirator declarations. They argue that under the Confrontation Clause a trial court may not admit co-conspirator declarations unless it first finds that they contain special "indicia of reliability." The short answer to this claim is that the court of appeals employed precisely the analysis urged by petitioners; the court simply reached a result with which petitioners disagree. Because petitioners have already had the benefit of the constitutional rule they propose, their claim reduces to the fact-bound contention that the court of appeals misapplied that rule in this case.

a. In rejecting petitioners' claim, the court of appeals based its analysis on the court's earlier decision

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[14] Petitioners' argument, taken to its logical limits, would significantly impair the effectiveness of the RICO statute. For example, New York grand jury law—in addition to the rule requiring corroboration of accomplices—prohibits the use of hearsay, see N.Y. Crim. Proc. Law § 190.30 (McKinney 1982), and the government's impeachment of witnesses it has called before the grand jury, see *People* v. *Fiore*, 112 Misc. 2d 45, 48, 445 N.Y.S.2d 960, 961-962 (Nassau County Ct. 1981). Every grand jury witness, moreover, is automatically entitled to immunity, see N.Y. Crim. Proc. Law § 190.40 (McKinney 1982), and the government may seek an indictment only where there is sufficient evidence to convict at trial, see *People* v. *Monroe*, 125 Misc. 2d 550, 480 N.Y.S.2d 259 (Sup. Ct. 1984). If, as petitioners suggest, the RICO statute adopts state procedural rules, the effectiveness and uniform application of the statute would be substantially undermined because of the wide assortment of applicable state procedural rules that would govern the conduct of federal grand jury and trial proceedings.

in *United States* v. *Puco*, 476 F.2d 1099, 1107 (2d Cir.), cert. denied, 414 U.S. 844 (1973). As in *Puco*, the court of appeals in this case held that when a co-conspirator's out-of-court statement is offered into evidence, the trial judge must determine whether the statement bears " 'sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination' " (Pet. App. A7 (quoting *Puco*, 476 F.2d at 1107)). The court further noted that it had previously recognized that " 'a higher standard of reliability is imposed if the hearsay statements are "crucial" to the Government's case.' " *Ibid.* (quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)). Nonetheless, the court observed, only rarely will a statement otherwise admissible under the hearsay rules fail to contain the indicia of reliability required by the Confrontation Clause. Because of the nature of the statements at issue in this case, the court held, no detailed reliability analysis was required (Pet. App. A7).

Contrary to petitioners' assertion, this Court's decision in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), does not require a different result. In *Roberts*, this Court rejected a Confrontation Clause challenge to the admission at trial of testimony that had been given at a preliminary hearing. The Court stated (448 U.S. at 65-66) that the Confrontation Clause requires that out-of-court statements offered at trial must ordinarily be shown to be reliable. Significantly, however, the Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66. Because the rule governing co-conspirator statements is just such a firmly rooted hearsay exception, we submit that *Roberts* supports the view that the Con-

frontation Clause does not require a separate inquiry into the reliability of statements that are found to satisfy the traditional co-conspirator declaration rule, see Fed. R. Evid. 801(d)(2)(E).[15]

To be sure, there is a conflict among the circuits on the question whether the Confrontation Clause requires a further "reliability review" beyond the reliability judgment assured by the requirements of Rule 801(d)(2)(E). Several circuits do not require a further examination of a statement's reliability, once that statement has been found to satisfy the co-conspirator declaration rule. See *United States* v. *Chindawongse*, 771 F.2d 840, 845-847 (4th Cir. 1985), cert. denied, No. 85-735 (Jan. 21, 1986); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Other courts, including the Second Circuit, require a separate reliability analysis under the Confrontation

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[15] Much of what this Court said about co-conspirator declarations in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), underscores this point. There, the Court refused to apply to co-conspirator statements a rule, applicable to prior testimony, requiring a preliminary determination of the declarant's unavailability. While expressly declining to decide whether trial courts must subject such statements to an independent reliability test (slip op. 4 n.3), the Court took special account of the "evidentiary significance of statements made when the conspiracy was operating in full force" (*id.* at 8). In light of these special features, the Court chose "to affirm the validity of the use of co-conspirator statements" and "decline[d] to require a showing of the declarant's unavailability as a prerequisite to their admission" (*id.* at 12-13).

Clause, even after the statements have passed muster under the rules of evidence. See, *e.g.*, *United States* v. *DeLuna*, 763 F.2d 897, 909-911 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Arbalaez*, 719 F.2d 1453, 1459-1460 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *United States* v. *Ammar*, 714 F.2d 238, 256-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983). As a practical matter, however, this difference in approach has proved to be of little significance: there apparently has never been a case in which a court of appeals has excluded a co-conspirator's statement under the Confrontation Clause after finding that the statement satisfied Rule 801(d)(2)(E). For that reason, the conflict among the circuits on this issue is not one that warrants this Court's attention. In any event, the Second Circuit is one of the courts that requires an independent reliability review under the Confrontation Clause. Petitioners had the benefit of the more generous standard in this case, so review by this Court is particularly inappropriate here.

b. Under the reliability analysis urged by petitioners—and applied by the court of appeals in this case—it is clear that the co-conspirator statements in this case were correctly admitted at trial. First, almost all the statements related to contemporaneous events. There was therefore no risk of inaccuracy stemming from faulty recollection on the part of the declarants. See *United States* v. *McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980); *United States* v. *Wright*, 588 F.2d 31, 37-39 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979).

Second, the statements were virtually all against the penal interest of the declarants. Again, this factor decreased the likelihood that the statements would be false or mistaken. See *United States* v. *Pagan*,

721 F.2d 24, 31 (2d Cir. 1983); *United States* v. *Perez*, 702 F.2d 33, 37 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

Third, contrary to Paone's assertion (85-1892 Pet. 14), the declarants in this case had no apparent motive to dissemble; most of the statements were made among the co-conspirators at a time when they knew each other to be members of the conspiracy. See *United States* v. *Mallah*, 503 F.2d 971, 980 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). Moreover, most of the statements were made while the declarants were reacting to, planning, or carrying out significant events in the operation of the enterprise. It was therefore most unlikely that the co-conspirators would have intentionally misreported those important events to their associates. See *United States* v. *DeLuna*, 763 F.2d at 910 & n.3; *United States* v. *Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir.), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Ammar*, 714 F.2d 256-257 & n.16; *United States* v. *Wright*, 588 F.2d at 37-38.[16]

Finally, the co-conspirators' declarations in this case were well corroborated by the testimony of the principal government witnesses and by other evidence.

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[16] In attacking the reliability of the co-conspirator declarations, Paone (85-1892 Pet. 4-8, 17-18) has erroneously focused on the motivations of the witnesses at trial to lie in recounting those declarations. The probity or lack of probity of the witnesses who reported the declarations, however, has little to do with the admissibility of the declarations themselves under the Confrontation Clause, since the trial witnesses were available to be cross-examined on the accuracy of their reports. It is the *declarants'* motivations that are important; and in this case there is no basis to believe that the declarants had any motivation to dissemble at the time they made the statements.

See *United States* v. *DeLuna*, 763 F.2d at 910-911; *United States* v. *Ammar*, 714 F.2d at 256-257; *United States* v. *Wright*, 588 F.2d at 38. The bulk of the government's case was based on the first-hand observations of witnesses Oliveri, Monachino, Pelusio, Rallo, and gambling club operator Thomas DiGiulio. Their testimony was extensively corroborated with respect to particular events by physical evidence and by police surveillance evidence.[17] In sum, because the court of appeals applied the same reliability test that is urged by petitioners, and because, after applying that test to the lengthy and complex factual record in this case, the court of appeals found the statements to be admissible, this issue does not warrant further review.

4. Petitioner Marotta contends (85-1883 Pet. 16-18) that he was denied his right to conflict-free counsel when the district court refused to grant him a severance or a continuance so that he could discharge

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[17] To the extent that Confrontation Clause analysis must also include consideration whether the statements are "crucial" to the prosecution or "devastating" to the defense (see *Dutton* v. *Evans*, 400 U.S. 74 (1970)), as petitioners also suggest (85-1892 Pet. 18-21; 85-1949 Pet. 17-18), the statements in this case were neither. The co-conspirator declarations did fill in certain details about which the government witnesses did not have first-hand knowledge. But because of the substantial additional evidence inculpating the defendants, and the extensive corroboration of the testimony of the principal witnesses, the co-conspirator declarations played a relatively limited independent role in inculpating the defendants. See *United States* v. *Perez*, 658 F.2d at 662. The court of appeals was therefore correct in concluding that this was not a case calling for the application of the Second Circuit rule that imposes a higher standard of reliability when the hearsay statements are "crucial" to the government's case (Pet. App. A7, quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)).

his attorney and substitute new counsel during the trial. Building on this claim, petitioners Marino and Rossi assert (85-1949 Pet. 11-13) that the other defendants were prejudiced by the continued involvement of Marotta's lawyer in the case. These arguments are meritless.

a. During his cross-examination, government witness Angelo Monachino disclosed that when he was arrested in 1975 on unrelated charges, attorney Richard Miller, who represented Marotta in this trial, had sought to obtain bail for him. At a bench conference, Miller explained that he had shared an office with Monachino's lawyer at that time, and that on several occasions between February and June 1975 he had assisted Monachino's lawyer in representing Monachino on the pending charges, all of which were unrelated to the charges involved in this case. Miller added that he had not represented Monachino on any matter since 1975 (Tr. 1000-1002).

At that point, Marotta requested that Miller be discharged as his attorney, and he asked for permission to retain new counsel (Tr. 1018). The court then held a lengthy colloquy with Monachino, in which Monachino agreed to waive his attorney-client privilege with regard to any disclosures he may have made to Miller in the course of that representation (Tr. 1038-1052; see also Tr. 1112-1113). Following that colloquy, the district court declined to grant Miller leave to withdraw from the case.

The court of appeals correctly held that the district court's action did not abridge Marotta's Sixth Amendment rights. First, the court noted that a criminal defendant does not have an unfettered right to substitute new counsel, particularly after trial has commenced, when such a step will require a severance, a

delay in the trial, or some other disruption in the proceeding. See *United States ex rel. Spurlark* v. *Wolff*, 683 F.2d 216, 219-220 (7th Cir. 1982); *McKee* v. *Harris*, 649 F.2d 927, 931 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982); *United States* v. *Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973). Certain restraints must be placed on the reassignment of counsel lest the right be " 'manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' " *McKee* v. *Harris*, 649 F.2d at 931 (quoting *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), cert. denied, 375 U.S. 940 (1963)). In this case, to have permitted Marotta to change counsel would have required either a lengthy postponement in the trial or, more likely, a severance and a separate trial for Marotta alone. In these circumstances, it was perfectly proper for the court to deny the request for substitution of counsel.

Moreover, as the court of appeals correctly held, Miller's purported conflict of interest was highly attenuated. Miller's representation of Monachino had occurred ten years earlier, it was extremely limited in nature, and it was unrelated to any of the present charges. In addition, Monachino expressly waived any attorney-client privilege he had, which authorized Miller to use, on Marotta's behalf, any information he may have secured during the prior representation. Under these circumstances, Marotta could not have been prejudiced by Miller's prior representation of Monachino. See *United States* v. *Agosto*, 675 F.2d 965, 972 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Shepard*, 675 F.2d 977, 980 (8th Cir. 1982); *Theodore* v. *New Hampshire*, 614 F.2d 817 (1st Cir. 1980); *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied,

446 U.S. 964 (1980); *United States* v. *Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); see generally *United States* v. *Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982) ("we are aware of [no case] in which an attorney has been disqualified on grounds of conflicting prior representation solely at the behest of a person other than the former client or its privy"), cert. denied, 466 U.S. 951 (1984). Finally, the district court carefully informed the jury of the insubstantial nature of the prior representation and advised the jurors that they were to draw no adverse inferences from that representation (Pet. App. A10; Tr. 1114-1116). The court of appeals correctly concluded that in view of the detailed instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any showing of prejudice to Marotta,[18] no substitution of counsel was necessary.[19]

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[18] Marotta complains (85-1883 Pet. 12-15) that as a result of his inability to obtain substitute counsel, he was unfairly bound by the stipulations entered into by other counsel, to which he did not agree. That is incorrect. In fact, Marotta signed certain of the stipulations and declined to sign others. The court repeatedly acknowledged that Marotta would not be bound by the stipulations that he did not sign, and it so instructed the jury (Tr. 5332, 5596, 6509-6512, 6530-6535).

[19] Petitioner's claim (85-1883 Pet. 16) of a conflict among the circuits on this issue is insubstantial. Petitioner relies on *Walberg* v. *Israel*, 766 F.2d 1071 (7th Cir. 1985), cert. denied, No. 85-331 (Dec. 12, 1985) and *Wilson* v. *Mintzes*, 733 F.2d 424 (6th Cir.), vacated, 469 U.S. 926 (1984), on remand, 761 F.2d 275 (6th Cir. 1985), in which the courts ruled that substitution of counsel should have been allowed. Those cases, however, are readily distinguishable. In *Walberg* the court of appeals granted relief because it concluded that the trial court's hostility to defense counsel had denied the defendant a fair trial. In *Wilson*, the court of appeals likewise concluded that the trial judge's antagonism toward defense

b. Petitioners Marino and Rossi argue (85-1949 Pet. 11-13) that the remaining defendants were prejudiced by Miller's continued representation of Marotta at trial. They reason that Miller's previous representation of Monachino, coupled with his ongoing representation of Marotta, bolstered in the minds of the jurors the government's theory "that an organization/enterprise existed * * * and that one of its objectives was to subvert law enforcement efforts by supplying legal assistance to its alleged members" (85-1949 Pet. 12). This is a most speculative inference to draw; certainly nothing in the one line of testimony about Miller's prior representation of Monachino suggested that Miller had been hired to represent Monachino by the "enterprise"—much less that Miller was subsequently reassigned to Marotta in some sort of "mob legal services" arrangement (*ibid.*). Indeed, in the setting in which the Miller episode arose, it is particularly unlikely that the jury drew any parallel between that episode and the two instances in which members of the enterprise had obtained legal assistance for others. The testimony about those two instances came much later in the trial and involved defendants other than Marotta. Moreover, the court's curative instruction put to rest any possible adverse inference the jury might have drawn from the Miller episode; the court carefully explained to the jury that Miller was simply accommodating an attorney with whom he shared office space when he represented Monachino, that he performed a relatively minor service, and that such an accommodation is not at all uncommon among criminal defense lawyers (Tr. 1114-1115).

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counsel, which included suggestions that counsel was incompetent, resulted in real prejudice to the presentation of a defense.

5. Petitioner Marino claims (85-1949 Pet. 14-15) that he was denied a fair trial when the court did not permit him to call Marotta's lawyer as a defense witness. The court of appeals correctly found that this argument was without merit (Pet. App. A16).

One morning late in the trial, counsel for Marino announced to the court that he had just learned from Marotta's attorney, Richard Miller, that Miller had been present at a gathering at Marino's home on the day of Gingello's funeral (Tr. 4052). Marino's counsel said that Miller would testify that the event was a quiet and entirely innocuous after-funeral affair, and not a meeting to plan revenge against the rival faction for the murder of Gingello. The trial court noted that if counsel wished to establish that point, Miller was not an essential witness, because there were many other persons present at that gathering who could testify on the point (Tr. 4053).[20] After a formal proffer was made at the close of the defense case, the district court ruled that because Miller was an attorney for a party in the case, it would be improper for him to appear as a defense witness (Tr. 6876).

It is well settled that a district court should not permit an attorney for a party to testify as a witness absent compelling reasons or extraordinary circumstances. See *United States* v. *Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); *United States* v. *Johnston*,

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[20] Contrary to petitioner's contention, there was no suggestion by the government at trial that the post-funeral gathering at Marino's house was anything but an innocuous post-funeral affair, as Miller would have testified. The government's evidence was that the critical meeting among the co-conspirators, at which they planned the campaign of revenge against Didio's faction, occurred at Rossi's apartment several days later (see Tr. 2766-2770, 3488, 3519-3523, 3552-3553).

690 F.2d 638, 644 (7th Cir. 1982); *United States* v. *Bates*, 600 F.2d 505, 510-511 (5th Cir. 1979); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); *United States* v. *Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974). Only if the proposed testimony is important, and there is no other way to present that evidence, is it appropriate to permit a participating lawyer to testify. *United States* v. *Bates*, *supra*; *United States* v. *Nyman*, 649 F.2d 208, 211 (4th Cir. 1980). Here, the court of appeals, with the entire record before it, concluded that the minimal value of Miller's prospective testimony did not warrant departing from the traditional proscription against testimony by a party's attorney. That decision was plainly correct: the post-funeral gathering at Marino's home was apparently a well-attended affair, and there were presumably other persons who could have testified about the nature of the affair, to the extent that that evidence was relevant at all.

6. Petitioners Russotti, Piccarreto, Marino, and Rossi contend (85-1901 Pet. 6-9; 85-1902 Pet. 16-19; 85-1949 Pet. 8-10) that the district court erred when it failed to admit the recorded testimony of two of the defendants from prior state proceedings. The defendants had offered testimony given by Colombo before a state grand jury and testimony given by Piccarreto in a state criminal trial. They argued that, although the prior testimony was hearsay as to the two declarants, it was admissible on behalf of the other defendants, under Fed. R. Evid. 804(b)(1), as the former testimony of an unavailable declarant. The district court refused to admit the prior testimony because the United States had not been a party to the state proceedings, and thus, as "the party against whom the testimony is now offered," the

United States did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). See *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, No. 84-971 (Apr. 15, 1985); *United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982); *United States* v. *Atkins*, 618 F.2d 366, 372-373 (5th Cir. 1980); see also D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1102 n.3 (1980).

Recognizing that Rule 804(b)(1) does not allow the admission of this proffered evidence, petitioners maintain that the rule is unconstitutional as applied. In making this argument, petitioners rely principally on this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *Chambers*, however, is readily distinguishable from this case. In *Chambers*, the defendant was prevented by state hearsay rules from introducing several statements made by a person who confessed to the very crime for which the defendant was on trial. The statements were thus directly exculpatory of the defendant, amounting to evidence "critical to Chambers' defense" (410 U.S. at 302). Moreover, the statements had considerable assurances of reliability: they were corroborated by other evidence; they were quite clearly against the penal interest of the declarant; and the declarant was in fact available for cross-examination (410 U.S. at 300-301).

Here, by contrast, the proffered testimony consisted of little more than bare self-serving denials of culpability by Piccarreto and Colombo (see Piccarreto App. 507-528, 6263-6264).[21] Piccarreto simply denied having been personally involved in the Massaro mur-

[21] "Piccarreto App." refers to the appendix to Piccarreto's brief in the court of appeals.

der plot; his testimony did nothing to exculpate the other defendants. Similarly, in his state grand jury testimony, Colombo simply denied that he and Oliveri had attempted to murder DiMarco. Thus, Colombo's testimony exculpated Colombo—who clearly was precluded from offering his own prior testimony—but it did nothing to exculpate the remaining defendants. Finally, in the prior state proceedings, both defendants were testifying under circumstances giving them a powerful motivation to lie.

Thus, the proffered testimony in this case was not critical to the defense, nor did it possess any of the assurances of reliability that characterized the evidence in *Chambers*. This would therefore be a highly unsuitable case in which to consider, as petitioners urge, whether to fashion a novel constitutional exception to Rule 804(b)(1).

7. Finally, petitioners Marino and Rossi contend (85-1949 Pet. 25-27) that the court of appeals erred in permitting consecutive sentences for their convictions under the RICO substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). That contention flies in the face of this Court's analysis of closely analogous statutory schemes as well as the rule adopted in the great majority of circuits.

This Court has long held that it is permissible to impose consecutive sentences for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit cumulative punishment. In *Albernaz* v. *United States*, 450 U.S. 333

(1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).

Applying the same analysis, the courts of appeals that have considered the issue have noted that RICO substantive and conspiracy provisions require proof of separate elements; they have therefore almost uniformly concluded that the two provisions permit consecutive punishments. *United States* v. *Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Marrone*, 746 F.2d 957, 959 (3d Cir. 1984); *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d 564, 570-571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). The only exception is the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001, 1040 (en banc), cert. denied, 453 U.S. 912 (1981). In *Sutton*, the court held that because the same evidence at trial supported both the

RICO substantive and conspiracy convictions, the convictions merged for purposes of sentencing. As later cases have pointed out, however, the *Sutton* court overlooked the fact that the *Blockburger* test focuses not on the evidence adduced at trial, but on the elements of the crimes charged. *United States* v. *Davis*, No. 85-2473 (10th Cir. June 9, 1986), slip op. 6-8; *United States* v. *Watchmaker*, 761 F.2d at 1477; *United States* v. *Marrone*, 746 F.2d at 959. As long as the elements of the two crimes are different, there is no constitutional impediment to imposing cumulative punishments for conduct that violates both statutory provisions—even if the same proof at trial supported both convictions.

Although there is a conflict among the circuits on this issue, it is not one that requires resolution by this Court. The *Sutton* case was decided before this Court's decision in *Albernaz* and before most of the circuit court decisions that have rejected *Sutton*'s analysis of the consecutive sentencing issue. In light of these subsequent developments we believe that when the Sixth Circuit once again squarely confronts the issue, it is highly likely that that court will conclude that consecutive sentences are permissible under 18 U.S.C. 1962(c) and (d).[22]

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[22] In *United States* v. *Qaoud*, 777 F.2d 1105, 1118 (1985), the Sixth Circuit referred to its previous decision in *Sutton*, but it did not have occasion to revisit the merits of the consecutive sentencing issue.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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